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In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

GRACE AZNAVORIAN, ETC.

GRACE AZNAVORIAN, ETC., APPELLANTS

v.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Constitutional and statutory provisions involved	3
Statement	5
Summary of argument	12
Argument:	
I. The thirty-day rule of Section 1611(f) does not violate the Due Process Clause of the Fifth Amendment	15
A. Section 1611(f) is constitutional if it bears a rational relation to a legitimate legislative purpose	15
B. The 30-day rule is rationally related to legitimate governmental purposes	21
1. Restricting eligibility for SSI benefits to United States residents	21
2. Limiting benefits to those who need them for subsistence in the United States	24
II. Retroactive monetary relief is barred by sovereign immunity	28
III. The district court acted within its discretion in limiting monetary relief to class members who are currently needy	32
Conclusion	34

CITATIONS

Cases: Page

Aptheker v. *Secretary of State*, 378 U.S. 500 17
Califano v. *Gautier Torres*, No. 77-88, decided February 27, 1978 ..... 12, 15, 16
Califano v. *Goldfarb*, 430 U.S. 199, affirming 396 F. Supp. 308 31
Califano v. *Jobst*, No. 76-860, decided November 8, 1977 ..... 12, 15
Califano v. *Webster*, 430 U.S. 313 18
Cleland v. *National College of Business*, No. 77-716, decided March 20, 1978 15
Craig v. *Boren*, 429 U.S. 190 18
Dandridge v. *Williams*, 397 U.S. 471 ..... 15, 26-27
DeLao v. *Califano*, 560 F. 2d 1384 29
Duarte v. *United States*, 532 F. 2d 850 29
E. I. duPont de Nemours & Co. v. *Train*, 430 U.S. 112 9
Edelman v. *Jordon*, 415 U.S. 651 30-31
Elliott v. *Weinberger*, 564 F. 2d 1219, petition for a writ of certiorari pending *sub nom. Califano* v. *Elliott*, No. 77-1511 9
Foley v. *Connelie*, No. 76-839, decided March 22, 1978 19
Hecht Co. v. *Bowles*, 321 U.S. 321 ..... 15, 33
Jefferson v. *Hackney*, 406 U.S. 535 ..... 15, 16
Jimenez v. *Weinberger*, 523 F. 2d 689, certiorari denied, 427 U.S. 912 10
Johnson v. *Mathews*, 539 F. 2d 1111 ..... 11, 29
Jordon v. *Trainor*, 563 F. 2d 873, certiorari granted *sub nom. Quern* v. *Jordon*, February 27, 1978 (No. 77-841) 11
Kent v. *Dulles*, 357 U.S. 116 17

Cases (Continued): Page

Liberty Alliance of the Blind v. *Califano*, 568 F. 2d 333 10
Maher v. *Roe*, 432 U.S. 464 19
Mathews v. *De Castro*, 429 U.S. 181 ..... 15, 16
Mathews v. *Diaz*, 426 U.S. 67 15
Memorial Hospital v. *Maricopa County*, 415 U.S. 250 17
Milliken v. *Bradley*, 433 U.S. 267 31
Norton v. *Mathews*, 427 U.S. 524 8
Philbrook v. *Glodgett*, 421 U.S. 707 10
Reed v. *Reed*, 404 U.S. 71 18
Richardson v. *Belcher*, 404 U.S. 78 15
Rothstein v. *Wyman*, 467 F. 2d 226, certiorari denied, 411 U.S. 921 33
Shapiro v. *Thompson*, 394 U.S. 618 16
Soriano v. *United States*, 352 U.S. 270 30
Stone v. *Powell*, 428 U.S. 465 31
Tatum v. *Mathews*, 541 F. 2d 161 29
Trimble v. *Gordon*, 430 U.S. 762 19
United States v. *Guest*, 383 U.S. 745 ..... 16, 17
United States v. *King*, 395 U.S. 1 30
United States v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33 31
United States v. *Sherwood*, 312 U.S. 584 30
United States v. *Testan*, 424 U.S. 392 ..... 28, 29, 30
Webster v. *Fall*, 266 U.S. 507 31
Weinberger v. *Salfi*, 422 U.S. 749 ..... 9, 15, 27
Weinberger v. *Wiesenfeld*, 420 U.S. 636, affirming 367 F. Supp. 981 31
Zablocki v. *Redhail*, No. 76-879, decided January 18, 1978 20
Zemel v. *Rusk*, 381 U.S. 1 ..... 17, 18

Constitution, statutes, regulations and rule: Page

United States Constitution:

Fifth Amendment 2, 3, 29
Eleventh Amendment 11, 31

Social Security Act, 49 Stat. 620, as amended, 42 U.S.C. (and Supp. V) 301 *et seq.*:

Section 205(g), as added, 53 Stat. 1370, and amended, 42 U.S.C. 405 (g) 4, 7, 8, 9, 10, 14, 28
Section 205(h), as added, 53 Stat. 1370, and amended, 42 U.S.C. 405 (h) 8
Section 1601, as added, 86 Stat. 1465, and amended, 42 U.S.C. (Supp. V) 1381 *et seq.* 5
Section 1611(f), 42 U.S.C. (Supp. V) 1382(f) ..... *passim*
Section 1612, 42 U.S.C. (Supp. V) 1382a 26
Section 1613, 42 U.S.C. (Supp. V) 1382b 26
Section 1614 (a) (1) (B), 42 U.S.C. (Supp. V) 1382c(a) (1)(B) 5, 22
Section 1631(b), 42 U.S.C. (Supp. V) 1383(b) 4, 14, 29, 30, 32, 33
Section 1631(c)(3), 42 U.S.C. (Supp. V) 1383(b) 4, 7, 8

28 U.S.C. 1361 9
20 C.F.R. 416.1101 *et seq.* 26

Constitution, statutes, regulations and rule—Continued Page

20 C.F.R. 416.1201 *et seq.* 26
Fed. R. Civ. P. 23 8

Miscellaneous:

H. R. Rep. No. 92-231, 92d Cong., 1st Sess. (1971) 22
S. Rep. No. 92-1230, 92d Cong., 2d Sess. (1972) 22

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OPINION BELOW

The opinion of the district court (J.S. App. 1A-33A)[1] is reported at 440 F. Supp. 788.

JURISDICTION

The district court's order was entered on August 23, 1977 (J.S. App. 34A-38A) and its judgment on September 6, 1977 (J.S. App. 39A-40A). The Secretary's notice of appeal to this Court was filed on September 22, 1977 (J.S. App. 41A) and Aznavorian's notice of cross-appeal was filed on October 4, 1977 (No. 77-5999 J.S. App. 41a-42a). On March 20, 1978, this Court noted probable jurisdiction of both appeals and consolidated the cases.[2] This Court's jurisdiction rests on 28 U.S.C. 1252.

QUESTIONS PRESENTED[3]

1. Whether Section 1611(f) of the Social Security Act violates the Due Process Clause of the Fifth Amendment by preventing otherwise eligible persons from receiving Supplemental Security Income benefits for months spent outside the United States and by suspending payment of such benefits to otherwise eligible persons who have remained outside the country for more than 30 consecutive days, until such persons return to the United States and stay within the country for 30 consecutive days.

2. Whether sovereign immunity bars the award of retroactive monetary relief to persons denied Supplemental Security Income benefits under a statutory section held unconstitutional.

3. Whether the district court properly awarded monetary relief to only those members of the plaintiff class who are "currently needy."

[1] "J.S. App." refers to the appendix to the jurisdictional statement in No. 77-991.

[2] By agreement between the parties, this opening brief addresses the issues in both cases.

[3] We have deleted from the Questions Presented one of the questions framed in the jurisdictional statement. See note 6, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

Section 1611(f) of the Social Security Act, as added, 86 Stat. 1468, 42 U.S.C. (Supp. V) 1382(f), provides:

> Notwithstanding any other provision of this title, no individual shall be considered an eligible individual for [Supplemental Security Income benefits] * * * for any month during all of which such individual is outside the United States (and no person shall be considered the eligible spouse of an individual for purposes of this title with respect to any month during all of which such person is outside the United States). For pur-

poses of the preceding sentence, after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 consecutive days.

Section 1631(b) of the Social Security Act, as added, 86 Stat. 1476, and amended, 42 U.S.C. (Supp. V) 1383(b), provides in pertinent part:

> Whenever the Secretary finds that more or less than the correct amount of benefits has been paid with respect to any individual, proper adjustment or recovery shall, subject to the succeeding provisions of this subsection, be made by appropriate adjustments in future payments to such individual or by recovery from or payment to such individual or his eligible spouse (or by recovery from the estate of either).

Section 1631(c)(3) of the Social Security Act, as added, 86 Stat. 1476, and amended, 42 U.S.C. (Supp. V) 1383(c)(3), provides:

> The final determination of the Secretary after a hearing [on eligibility for or the amount of Supplemental Security Income benefits] * * * shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title.

Section 205(g) of the Social Security Act, as added, 53 Stat. 1370, and amended, 42 U.S.C. 405(g), provides in pertinent part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. * * * The court shall have power to enter * * * a judgment affirming, modifying, or reversing the decision of the Secretary * * *.

STATEMENT

1. The program of Supplemental Security Income ("SSI") for the Aged, Blind, and Disabled, as added, 86 Stat. 1465, and amended, 42 U.S.C. (Supp. V) 1381 *et seq.*, was enacted to replace several cooperative federal-state programs with a single, uniform system of welfare benefits administered by the Secretary of Health, Education, and Welfare. The new program guarantees a monthly income to persons who meet federally prescribed income levels and other eligibility criteria.

Section 1614(a)(1)(B) of the Social Security Act, 42 U.S.C. (Supp. V) 1382c(a)(1)(B), restricts eligibility for SSI benefits to residents of the United States. Section 1611(f) of the Act, 42 U.S.C. (Supp.

V) 1382(f), provides that no person shall receive SSI benefits for any month during all of which he is outside the United States. Section 1611(f) further provides that "after an individual has been outside the United States for any period of 30 consecutive days he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 consecutive days."

2. Grace Aznavorian left the United States to go to Guadalajara, Mexico, on July 21, 1974. When she left the United States, she was receiving SSI benefits. While in Mexico, Aznavorian became ill and was unable to return to the United States until September 1, 1974. Under the 30-day rule of Section 1611(f),[4] the Secretary of Health, Education, and Welfare, did not pay Aznavorian SSI benefits for the months of August and September 1974 (J.S. App. 2A-3A).

Aznavorian sought reconsideration, and the Secretary adhered to his decision. A hearing was then conducted at Aznavorian's request. The hearing examiner found that under Section 1611(f) Aznavorian was ineligible for SSI benefits during August and September 1974. The Appeals Council agreed. After

[4] We use the term "30-day rule" as a shorthand reference to the provisions of Section 1611(f). The rule does not always depend on 30 days' absence, however, because the first sentence of that section precludes payment of SSI benefits for any month during all of which an otherwise eligible recipient is outside the United States. Thus, a person abroad for the entire month of February could not receive SSI benefits for that month, even if he or she returned to the United States before being absent for 30 consecutive days.

thus exhausting her administrative remedies, Aznavorian filed this action challenging the constitutionality of the 30-day rule of Section 1611(f). The district court's jurisdiction was invoked under Sections 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 42 U.S.C. (Supp. V) 1383(c)(3). Aznavorian sought relief for herself and all persons similarly situated. She moved for class certification, and the Secretary moved for summary judgment (J.S. App. 1A, 3A-4A).

The district court issued an opinion (J.S. App. 1A-33A) and order (*id.* at 34A-38A) certifying Aznavorian's suit as a class action[5] and granting summary judgment against the Secretary. The court reasoned that, because "[t]he right to travel beyond the frontiers of the United States is a basic constitutional right" (*id.* at 12A), any statute that could affect the exercise of that right must "be measured against a test more exacting than the 'rational basis' standard" (*id.* at 13A). The court selected a "middle ground or middle standard" (*id.* at 15A) from cases dealing with sex discrimination, and it held that the statute does not bear "a fair and substantial relation-

[5] The certified class was defined as (J.S. App. 34A-35A):

> All individuals otherwise eligible for Supplemental Security Income, who have had such SSI denied, suspended, terminated, or interrupted pursuant to an initial written determination, an administrative reconsideration, an administrative hearing, or an Appeals Council review, based solely on 42 U.S.C. § 1382(f) and regulations promulgated thereunder, from September 26, 1975 until the entry of this Order.

ship in fact to the governmental purposes it seeks to achieve" (*id.* at 16A) because, under this "middle standard," "administrative convenience is not a substantial enough reason to justify penalizing the basic constitutional right to international travel" (*id.* at 17A). In the court's view, the Constitution does not allow SSI eligibility to be suspended solely on the basis of a lengthy absence from the United States, but rather requires individual determination of residence based on "objective factors, such as continued ownership or rental of a home" (*id.* at 19A).

The court also concluded that class actions are permissible under Section 205(g) of the Social Security Act, as incorporated in Section 1631(c)(3), when every member of the class has presented a claim for benefits to the Secretary and the Secretary has decided the case adversely to each member (J.S. App. 4A-7A). It concluded that the requirements of Fed. R. Civ. P. 23 were met in this case (*id.* at 7A-10A) and certified the class accordingly.[6] In light of its

[6] We argued in *Norton* v. *Mathews*, 427 U.S. 524, that, in light of the limitations on judicial review created by Sections 205(g) and (h) of the Social Security Act, 42 U.S.C. 405(g) and (h), district courts may resolve only the contentions of the person or persons who seek judicial review of the Secretary's decision in their case or cases and may not issue injunctions or grant relief to a class of potential beneficiaries. The Court stated that our arguments raised "difficult and perhaps close" problems (427 U.S. at 530), but it did not pass on our contentions in light of its decision that the statute in question is constitutional. Our jurisdictional statement in this case presented the question "Whether a class action may be maintained under Section 205(g) of the Social Security Act"

decision that Section 1611(f) is unconstitutional, the court ordered the Secretary to provide notice of its

(J.S. 4), thereby raising once more the issues not resolved in *Norton*.

We have elected not to ask the Court to decide those issues in this case. Although we adhere to the position that neither class actions nor injunctive remedies are authorized in Social Security cases (cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n. 8), we believe that several considerations make this case an inappropriate one for definitive resolution of the issues by this Court.

First, Aznavorian conceded in the district court that the only jurisdictional basis for this action is Section 205(g) (see J.S. App. 1A). Other courts, however, have held that whether or not Social Security class actions and injunctive relief are proper under Section 205(g), they are proper under 28 U.S.C. 1361. See, *e.g.*, *Elliott* v. *Weinberger*, 564 F.2d 1219 (C.A. 9), petition for a writ of certiorari pending *sub nom. Califano* v. *Elliott*, No. 77-1511. Because Section 1361 was not considered by the district court, this Court could not finally decide whether district courts may award injunctive or class relief in Social Security cases. It could reach that question, however, in *Elliott*, and we believe that it should do so in that case.

Second, the district court deemed "waived" our objection to the nationwide scope of the class (J.S. App. 10A). It probably was right to do so, because our belated objection had been put in terms of venue. Our more general argument, made in *Elliott* and in *Califano* v. *Mandley*, No. 76-1416, argued November 30, 1977 (with *Quern* v. *Mandley*, No. 76-1159), is that certification of a nationwide class cuts short judicial consideration of a legal issue and may require premature decision by this Court of issues that should be allowed to percolate in the lower courts. See *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n. 26. The Court could consider that argument in *Elliott* but not in the present case.

Third, every member of the class certified in the present case meets the requirements of Section 205(g). The class includes only persons who have presented a claim to the Sec-

decision to all members of the class who were receiving SSI benefits on the date of the court's order or

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retary and with respect to whom the Secretary made an adverse decision not more than 60 days before the suit was filed (J.S. App. 34A-35A). Moreover, the district court did not issue an injunction; it instead entered only a declaratory judgment that would have little more effect than the *stare decisis* consequences of a decision that simply ordered the Secretary to pay benefits to a single claimant. Other courts have issued class-wide injunctions or have defined classes that include persons whose claims would not independently meet the requirements of Section 205(g). See, *e.g.*, *Liberty Alliance of the Blind* v. *Califano*, 568 F.2d 333 (C.A. 3); *Johnson* v. *Mathews*, 539 F.2d 1111 (C.A. 8); *Jiminez* v. *Weinberger*, 523 F.2d 689 (C.A. 7), certiorari denied, 427 U.S. 912. *Elliott* involves both an injunction and a class containing persons who could not independently satisfy the requirements of Section 205(g), and consideration of that case thus would allow the Court to have before it the full range of arguments concerning class and injunctive relief.

Our decision not to press the class action question does not leave the problem of this Court's jurisdiction unaddressed. Here, as in *Salfi*, at least one person (Aznavorian) met the jurisdictional requirements of Section 205(g) no matter what the proper status of the class action may be. The Court therefore is free to consider all of the arguments made in this brief. Moreover, this Court's decision will have a *stare decisis* effect that could make further consideration of the class action standards unnecessary; if the Court should hold that Section 1611(f) is constitutional, the extent of the class would be irrelevant, and if the Court should hold that the statute is unconstitutional, the Secretary would give that decision immediate nationwide effect whether or not a class had been certified. Cf. *Philbrook* v. *Glodgett*, 421 U.S. 707, 720-722. We, of course, stand ready, nevertheless, to brief the class action issue if the Court so requests. (The Court also could refer to our brief in *Norton* for a presentation of our arguments if the Court believes them pertinent to its decision. A copy of that brief has been furnished to opposing counsel.)

who would then have been receiving benefits had it not been for Section 1611(f).[7]

The court held that payment of retroactive benefits to class members would not violate principles of sovereign immunity if it were to limit relief to persons who are "currently needy" (J.S. App. 28A-31A). So limiting the obligation to pay retroactive benefits, the court ordered the Secretary to pay benefits to Aznavorian and other members of the notified class whose benefits had been suspended because of the 30-day rule but who in fact had continued to be residents of the United States.

On February 21, 1978, the district court entered an order partially staying its judgment pending this Court's decision (A.). The court relieved the Secretary of the immediate obligation to notify designated class members of the Court's decision and to

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[7] We have argued, in a memorandum filed at the Court's request in *Randle* v. *Beal*, petition for a writ of certiorari pending, No. 76-6853, that the requirement of notification of a class of persons whose benefits were (in the past) affected by an unconstitutional social welfare statute offends the Eleventh Amendment. Similar reasoning would lead to the conclusion that the notice requirement here is improper under sovereign immunity principles. The Eleventh Amendment question is before the Court in *Jordan* v. *Trainor*, 563 F.2d 873 (C.A. 7) (*en banc*), certiorari granted *sub nom. Quern* v. *Jordan*, February 27, 1978 (No. 77-841). We have elected, however, not to present in this case any question concerning the authority of the district court to order that notice be given. (The notice question would be important, of course, only if the Court were to hold that the district court properly required the payment of retroactive benefits.)

pay retroactive benefits. The court did not, however, stay the declaratory portions of its judgment or the directive to pay retroactive benefits to Aznavorian. Accordingly, the Secretary has paid Aznavorian the benefits she would have received during August and September 1974, had it not been for Section 1611(f).

SUMMARY OF ARGUMENT

I

Section 1611(f) is rationally related to a legitimate governmental purpose and does not violate the Due Process Clause of the Fifth Amendment. This Court has repeatedly upheld statutory classifications in social welfare programs as long as they satisfy the "rational basis" test. The Court has followed this rule even where a challenged legislative judgment may incidentally affect a constitutionally protected right. *Califano* v. *Jobst*, No. 76-860, decided November 8, 1977 (possible incidental effect of Social Security classification on recipients' fundamental right to marry). Under the analysis of *Jobst*, the 30-day rule also should be sustained if it is supported by a rational basis.

The right to travel abroad is not a "fundamental" right. It is "no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment" and "[a]s such * * * can be regulated within the bounds of due process." *Califano* v. *Gautier Torres*, No. 77-88, decided February 27, 1978, slip op. 3 n. 6. Section 1611(f) has no more than an

incidental effect on the exercise of that constitutional liberty; the statute has no effect whatever on trips abroad that last less than 30 days, and it does not prohibit foreign travel of any duration.

The 30-day rule of Section 1611(f) complements the United States residence requirement for SSI eligibility. It serves as an important administrative aid in ensuring that SSI benefits are paid only to United States residents. Section 1611(f) avoids the necessity for individualized determinations of recipients' intent when they leave the country for extended periods and thus helps to reduce the cost and complexity of SSI administration.

The statute also contributes to the congressional goal of making certain that SSI benefits, calculated on the basis of the United States cost of living, are used to support persons who actually need the money to live in the United States. Section 1611(f) eases the burden of eligibility redeterminations by compelling recipients to be in the vicinity of Social Security Administration offices at least once each month. At the same time, the 30-day rule lessens the possibility of fraud by helping the SSA ascertain whether SSI benefits are being used for the support of their intended recipients. Section 1611(f) therefore bears a rational relation to several legitimate governmental purposes.

II

The United States has not waived its sovereign immunity with respect to recoveries of money as an accrued liability for action taken in the past in reli-

ance on an unconstitutional statute. To the extent Congress has spoken on the subject, it has prohibited payments by enacting Section 1611(f). The district court therefore erred in awarding retroactive monetary relief to SSI recipients who had been denied benefits through the operation of Section 1611(f).

Neither Section 205(g) nor Section 1631(b) of the Social Security Act authorizes recovery against the government on claims alleging that benefits were denied in accordance with an unconstitutional statutory provision. Section 205(g) is merely a grant of jurisdiction, and Section 1631(b) only authorizes payment of benefits to which a claimant was statutorily entitled. Aznavorian and her class admittedly were not entitled to benefits under the Act because of Section 1611(f), and they therefore cannot receive retroactive payments.

III

If this Court should conclude that the district court properly granted retroactive relief, it also should affirm the district court's decision to limit that relief to "currently needy" class members. The district court correctly reasoned that the SSI program is intended to aid the needy and that, therefore, an award of retroactive benefits to persons not in need on the date of the court's order would not advance the legislature's purpose in establishing the program. As argued above, Section 1631(b) of the Social Security Act does not authorize the award of retroactive monetary relief on claims like that presented here. *A fortiori*, it does not require such relief. In the absence of a statutorily prescribed remedy, the district court was free to exercise its equitable discretion in determining appropriate relief. See, *e.g.*, *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-331. The court's exercise of that discretion was proper and should be sustained.

ARGUMENT

I

THE THIRTY-DAY RULE OF SECTION 1611(f) DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

A. Section 1611(f) is constitutional if it bears a rational relation to a legitimate legislative purpose.

In determining whether particular classifications in social welfare laws satisfy the requirements of due process and equal protection, this Court consistently has held that the Constitution is satisfied if there is a rational basis for the legislature's choice. See, *e.g.*, *Cleland* v. *National College of Business*, No. 77-716, decided March 20, 1978; *Califano* v. *Gautier Torres*, No. 77-88, decided February 27, 1978; *Califano* v. *Jobst*, No. 76-860, decided November 8, 1977; *Mathews* v. *De Castro*, 429 U.S. 181; *Mathews* v. *Diaz*, 426 U.S. 67; *Weinberger* v. *Salfi*, 422 U.S. 749; *Jefferson* v. *Hackney*, 406 U.S. 535; *Richardson* v. *Belcher*, 404 U.S. 78; *Dandridge* v. *Williams*, 397 U.S. 471. Laws providing for governmental payments of monetary benefits are "entitled to a strong presumption of constitutionality" (*Mathews* v. *De Cas-*

tro, supra, 429 U.S. at 185), and legislative "efforts to tackle the problems of the poor and needy" will be sustained as long as the legislature's judgments are "rational, and not invidious" (*Jefferson* v. *Hackney*, *supra*, 406 U.S. at 546).

The district court reasoned, however, that Section 1611(f) must be scrutinized more closely than other statutory classifications because it could affect SSI recipients' decisions to travel abroad (J.S. App. 12A-16A). The court thought that some "middle standard" of review was appropriate and that the 30-day rule could be upheld only if it bore a "fair and substantial relationship" to a legitimate governmental purpose (*id.* at 16A-20A). But no decision of this Court holds that a special standard of review should be applied when a statutory provision potentially affects international travel.

Califano v. *Gautier Torres*, *supra*, stated that the "right" of international travel is "no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment" and "[a]s such * * * can be regulated within the bounds of due process" (slip op. 3 n. 6). Using language nearly identical to Mr. Justice Stewart's concurring statement in *Shapiro* v. *Thompson*, 394 U.S. 618, 642-643, the Court indicated that different degrees of constitutional protection are afforded to interstate and international travel. The Court repeated its earlier conclusion that "the right of interstate travel is virtually unqualified." See *United States* v. *Guest*, 383 U.S. 745, 757-758; *Shapiro* v. *Thompson*, *supra*, 394 U.S. at 630-

631 and n. 8; *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 254-255 and n. 7.[8] By contrast, the Court said, the right of international travel is subject to regulation. The Court cited three cases, all of which involved constitutional challenges to individual passport denials. See *Kent* v. *Dulles*, 357 U.S. 116; *Aptheker* v. *Secretary of State*, 378 U.S. 500; *Zemel* v. *Rusk*, 381 U.S. 1.

Appellees (Mot. to Affirm 4-10 and n. 9) and the district court (J.S. App. 14A-19A) found in those three cases the proposition that the right to international travel is a fundamental or basic right that may not be infringed absent a showing of special strength. As this Court's references to *Kent*, *Aptheker*, and *Zemel* indicate, however, those cases do not stand for that proposition. *Kent* held simply that Congress had not delegated to the Secretary of State the authority to withhold passports to citizens because of their beliefs or associations. *Aptheker* acknowledged the legislature's right to regulate travel abroad and held only that, in indiscriminately denying passports to all members of Communist organizations, the Subversive Activities Control Act swept too broadly and bore only a "tenuous relationship" (378

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[8] As the Court stressed in *United States* v. *Guest*, *supra*, 383 U.S. at 760 n. 17, "the constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private. In this connection, it is important to reiterate that the right to travel freely from state to state finds constitutional protection that is quite independent of the Fourteenth Amendment."

U.S. at 514) to the congressional purpose of protecting national security. *Zemel*, too, recognized the right of the legislature to regulate international travel; the Court there upheld the constitutionality of the Passport Act of 1926, as interpreted to authorize the Secretary of State to refuse, for reasons of foreign policy, to validate passports for travel to particular countries. None of these cases indicated that the right to travel abroad is "fundamental" or "basic;" none enunciated a special test for determining when particular foreign travel regulations violate the Due Process Clause.[9]

The district court's unsupported conclusion that foreign travel is a "basic" constitutional right led it to hold that any burden imposed by government on foreign travel must bear a "fair and substantial relationship" to a legitimate governmental purpose. The court avowedly derived this test from opinions of this Court in cases involving explicit gender discrimination. See, *e.g.*, *Reed* v. *Reed*, 404 U.S. 71, 76. Whatever may be the appropriate standard of review in such cases (see *Craig* v. *Boren*, 429 U.S. 190, 210-211 (Powell, J., concurring), 211-213 (Stevens, J., concurring); *Califano* v. *Webster*, 430 U.S. 313, 316-317), the rational basis test remains appropriate here,

[9] The most specific guidance was provided in *Zemel* (381 U.S. at 14): "[T]he fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited.

The requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction" (footnotes omitted).

where the challenged statute is part of a governmental program for the distribution of monetary benefits to the needy and involves no classification based on an accident of birth [10] or directly infringing a constitutionally protected right, fundamental or otherwise.

The 30-day rule does not directly prohibit or regulate foreign travel, and it is therefore unnecessary for the Court to decide how important foreign travel may be in the catalogue of constitutional "liberties." Section 1611(f) is absolutely neutral with respect to international trips lasting less than 30 days,[11] and it does not forbid trips of any duration. The only "penalty" for even the longest trip abroad is simply that the person does not receive social welfare benefits during a period approximately equal to the period of absence; in other words, the statute "places no obstacles—absolute or otherwise" in the path of persons desiring to travel for more than 30 days but simply leaves them "dependent on private sources" (*Maher* v. *Roe*, 432 U.S. 464, 474).[12] To borrow a phrase from *Zemel*, "the extent of the governmental restriction imposed" (381 U.S. at 14) is minimal.

[10] The Court has taken especially close looks at statutes involving such classifications. See, *e.g.*, *Foley* v. *Connelie*, No. 76-839, decided March 22, 1978 (alienage); *Trimble* v. *Gordon*, 430 U.S. 762 (illegitimacy).

[11] The sole exception to this general rule is discussed in note 4, *supra*.

[12] *Maher* held that, even though a woman has a "fundamental" right of privacy that protects her ability to obtain an abortion, the decision of a state not to pay for an abortion would be assessed under the rational basis test.

Moreover, as the Court recently held, classifications in statutes establishing social welfare programs should be reviewed under the "rational basis" test even if they may have an incidental effect on a constitutionally protected right. *Califano* v. *Jobst*, *supra* (possible incidental effect of Social Security classification on recipients' decision to marry).[13] The deterrent to extended international travel of which Aznavorian complains is simply not comparable to the penalties on interstate travel in *Shapiro* v. *Thompson*, *supra*, and *Memorial Hospital* v. *Maricopa County*, *supra*, or to the direct obstacles to international travel challenged in *Aptheker*.

The effect of Section 1611(f) on international travel is not different in kind from the effect of any rule that makes social welfare benefits depend on the residence of the beneficiary. As the Court held in *Gautier Torres*, a person who moves from one place to another has no legitimate claim of entitlement to continue receiving benefits from the place he left behind, no matter how important those benefits may have been and no matter how much the prospect of losing benefits may deter the person from moving. As long as it is conceded—as both Aznavorian (Mot. to Affirm 10-16) and the district court (J.S. App. 16A-18A) concede—that SSI benefits may be made

[13] See also *Maher* v. *Roe*, *supra*; *Zablocki* v. *Redhail*, No. 76-879, decided January 18, 1978, slip op. 13 n. 12 (even though there is a "fundamental" right to marry, provisions in social welfare laws that place "no direct legal obstacle in the path of persons desiring to get married" should be evaluated under the rational basis test); *ibid.* (Stevens, J., concurring).

contingent on actual residence in the United States, then the question of how to separate residents from non-residents inevitably becomes one of line-drawing.

The drawing of any line based on residence will discourage some persons from leaving the country, and any treatment of residence depending (in whole or in part) on the length of absence from the country will discourage trips that would take longer than the period specified by the line-drawer. But the length of absence from the country plainly has some bearing on residence: the longer a beneficiary is out of the country, the more reasonable it becomes to think that the beneficiary is not going to return. What is more, the longer the beneficiary is out of the country, the less reasonable it becomes to pay continuing benefits that are based on a supposed need for subsistence in the United States. If length of absence from the country is relevant to the decision to pay benefits, then this case involves only a legislative choice about how long to continue paying money to persons who have left the country and who may or may not return. It is thus a classic case of a policy judgment that should be sustained if it is rationally related to a legitimate legislative purpose.

B. The 30-day rule is rationally related to legitimate governmental purposes.

1. Restricting eligibility for SSI benefits to United States residents.

Both the district court and Aznavorian concede that Congress may limit SSI benefits to permanent residents of the United States (J.S. App. 16A-18A; Mot.

to Affirm 10-16). This Court's decision in *Gautier Torres* indicates that these concessions were well advised. We submit that Section 1611(f) is rationally related to this concededly legitimate purpose.

Congress intended the 30-day rule to be one means of implementing the residence requirement. That requirement is imposed directly by Section 1614(a)(1)(B) of the Social Security Act, 42 U.S.C. (Supp. V) 1382c(a)(1)(B), and implemented in part by the 30-day rule of Section 1611(f). Sections 1611(f) and 1614(a)(1)(B) were discussed together in a single paragraph in both the House and Senate committee reports on the Social Security Amendments of 1972. See H.R. Rep. No. 92-231, 92d Cong., 1st Sess. 149 (1971); S. Rep. No. 92-1230, 92d Cong., 2d Sess. 385 (1972).

The 30-day rule is well suited to the primary legislative purpose it serves. It is an administratively simple demarcation line. Without the 30-day rule or some equally simple (and therefore, on occasion, equally arbitrary) test, the Social Security Administration ("SSA") would be faced with the formidable task of determining whether each SSI recipient who leaves the United States is abandoning his residence here or is only leaving for a temporary visit or vacation. The district court's suggestion that the SSA determine subjective intent to remain abroad from available objective criteria [14] would entail both substantial

[14] The district court listed home ownership or rental, continued employment, and membership in organizations as possible factors to be considered. J.S. App. 19A.

expense and an inevitable potential for the sort of mistake that besets case-by-case adjudication.

Congress could reasonably conclude that most SSI recipients who intend to leave the country temporarily and maintain their residence here will return within 30 days. After all, SSI recipients are not wealthy and receive most or all of their income from social welfare programs. They are unlikely to take lengthy tours abroad, and absence for more than 30 days thus has a greater significance than it might for persons of more substantial means. An individualized determination of the subjective intent of SSI recipients who leave the country for extended periods, moreover, would entail significant additional administrative obligations and expense and would thus diminish the resources available to provide the basic SSI benefits at current levels. Some easily administrable method of restricting benefits to United States residents is a practical necessity if Congress' purpose is to be achieved. Cf. *Weinberger* v. *Salfi*, *supra* (upholding rule making benefits depend on duration of marriage, even though inquiry using subjective intent and other factors might be more reliable).

The portion of Section 1611(f) that prohibits restoration of SSI benefits to an otherwise eligible person who has travelled outside the United States for 30 or more consecutive days until that person has returned to the United States and remained here for at least 30 consecutive days also is rationally related to the legitimate purpose of ensuring that SSI recipients are United States residents. This provision

avoids the anomalous situation in which an otherwise eligible person could stay outside the United States for extended periods of time and nevertheless receive an SSI check immediately on each return to the country, thereby circumventing the residence requirement. It also avoids unequal treatment of persons who travel abroad for extended periods that include a full calendar month, on the one hand, and persons who remain outside the country for more than 30 consecutive days but arrange to leave the United States in one month and return before the end of the next, on the other. In short, the statutory scheme offers a fair and simple means for evaluating whether a given person is a continuing, full-time resident of the United States.

2. Limiting benefits to those who need them for subsistence in the United States.

SSI benefits are intended to help needy persons who are unable to meet from their own resources the cost of living in the United States. Benefits are calculated on the basis of the United States' cost of living. The rules barring payment of SSI benefits for months spent entirely outside the country and suspending SSI benefits after a recipient has been absent from the country for 30 consecutive days prevent recipients from obtaining "windfall" benefits while making extended visits to areas where the cost of living is less than it is in the United States.

Indeed, the application of a 30-day rule to recipients of benefits based on need may also serve to reinforce the need requirement. Because international

travel is costly, an extended trip abroad logically indicates one of three things: (1) the beneficiary has substantial resources in addition to SSI benefits and so may not need the benefits; (2) the beneficiary is staying with friends or relatives abroad and so does not need benefits that were computed on the costs of maintaining an independent household in the United States; or (3) the beneficiary is taking up residence outside the United States. If any of these possibilities is true—and one will be true in the great majority of cases—there is rational support for a decision to suspend benefits during the period of absence.

There is, moreover, no principled reason why Congress must pay benefits to all persons who may be called "residents" of the United States. Take, for example, a person with relatives in Canada who spends nine months of each year in the United States and three months staying with his Canadian relatives. Congress could rationally conclude that this person should receive benefits only for the portion of the year he resides in the United States. This would leave to Canada the decision whether the person should receive social welfare benefits for the period of his Canadian residence. In other words, the world need not be divided, either by statute or by principles of constitutional law, into categories of residents (who receive continuous benefits) and non-residents (who receive no benefits). There are many people who are best seen as part-time residents, and Section 1611(f) results in the receipt by part-time residents of the United States of benefits reasonably closely matched

to the proportion of time that these persons reside in the United States.

Section 1611(f) also reduces the SSA's administrative burden by eliminating the need to monitor and verify the continuing eligibility of persons who are travelling outside the United States.[15] Concomitantly, the 30-day rule reduces the possibility of fraud by requiring actual physical presence within reasonable proximity of a SSA office and thus enabling administrators to ensure that SSI benefits reach their intended recipients.

For all these reasons, Section 1611(f) should be upheld as a rational exercise of congressional power in the social welfare area.

We do not contend that the 30-day rule is a perfect method of preventing non-residents from receiving SSI benefits. We do not even contend that it is the best method available for accomplishing that objective. But enforcing the residence rule is not the statute's only objective; it therefore is not surprising that it produces less than perfect results when measured by that yardstick. However that may be, a statutory social welfare classification "does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge*

[15] The eligibility criteria for SSI benefits are set forth in Sections 1611, 1612, and 1613 of the Act, 42 U.S.C. (Supp. V) 1382, 1382a, and 1382b. These statutory provisions are supplemented by the Secretary's regulations, 20 C.F.R. 416.1101 *et seq.*, 416.1201 *et seq.*

v. *Williams*, 397 U.S. 471, 478. The Constitution does not require individual decisions that take into account all factors that might ideally be relevant to a decision to pay benefits. Broad and administratively convenient rules of eligibility, such as the 30-day rule, are permissible unless they bear no relationship to reality. *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 773-780.[16] See also *Cleland* v. *National College of Business*, *supra*; *Califano* v. *Jobst*, *supra*; *Mathews* v. *De Castro*, *supra*; *Mathews* v. *Diaz*, *supra*.

The congressional choice to eschew, in the interest of administrative convenience, individualized determinations of the residence of SSI recipients who travel abroad for more than 30 days is not arbitrary. That choice should be upheld as a reasonable means of limiting SSI payments to persons who live in the United States and of accomplishing the other legitimate legislative purposes discussed above.

[16] The Court stated in *Salfi* (422 U.S. at 777):

> [T]he question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions * * *. Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule.

II

RETROACTIVE MONETARY RELIEF IS BARRED BY SOVEREIGN IMMUNITY

If the Court should disagree with our submission that Section 1611(f) is constitutional, it then would be required to consider whether the district court was authorized to order the government to pay money to persons harmed by the operation of the statute. For the reasons that follow, we submit that it was not.

This Court has held that monetary relief for past harms is not available against the United States unless Congress has specifically determined that such relief is appropriate, *i.e.*, unless Congress has waived the government's sovereign immunity. *United States* v. *Testan*, 424 U.S. 392. Congress has not authorized the payment of money to Aznavorian or the class certified by the district court. To the contrary, Congress, by enacting Section 1611(f), explicitly *prohibited* the payment of money. If the Court should hold that Section 1611(f) is unconstitutional, that would remove the prohibition, but it would not create a statutory authorization for retroactive payments. Such an award would be permissible only if some other provision of the statute authorized it. None of the provisions relied on by Aznavorian and the district court authorizes retroactive relief. Like the Tucker Act provision reviewed in *Testan*, Section 205(g) of the Social Security Act merely grants the federal courts jurisdiction to hear certain cases; it does not create a substantive right to a monetary remedy whenever the government withholds benefits

in accordance with a stautory provision later held unconstitutional. See *DeLao* v. *Califano*, 560 F.2d 1384, 1389-1391 (C.A. 9); *Tatum* v. *Mathews*, 541 F.2d 161, 165-166 (C.A. 6); *Johnson* v. *Mathews*, 539 F.2d 1111, 1122-1125 (C.A. 8).

Nor may any other provision of the Social Security Act " 'fairly be interpreted as mandating compensation by the Federal Government for the damage sustained' " (*United States* v. *Testan*, *supra*, 424 U.S. at 400).[17] It would be hard to argue that the Act, which in Section 1611(f) explicitly forbids payments, simultaneously authorizes them. There is no provision stating that, if a portion of the statute prohibiting payment is declared invalid, then payment is deemed authorized. The closest thing to such a provision is Section 1631(b) of the Act, 42 U.S.C. (Supp. V) 1383(b), which directs the Secretary to make retroactive payments to persons wrongfully denied benefits to which they were statutorily entitled.

There is a critical distinction, however, for purposes of Section 1631(b), between administrative decisions that comported with basic statutory rules and decisions that violated the statute. If the Secretary should misinterpret or misapply the statute, Section 1631(b) authorizes a court to order the Secretary to pay retroactive benefits. That judicial order carries out the statutory plan and corrects the Secretary's error. It requires the payment of benefits that

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[17] The Due Process Clause itself is not a waiver of sovereign immunity. See *Duarte* v. *United States*, 532 F.2d 850, 852 (C.A. 2).

Congress itself wanted to be paid. Here, however, the Secretary acted in accordance with Congress' plan; this case does not involve an order to the Secretary to pay benefits that Congress wanted to be paid. Aznavorian received the "correct amount of benefits" within the meaning of Section 1631(b), and no relief is required by that statute. In other words, Section 1631(b) creates a remedy for an administrative violation of the statute but not for a deficiency in the statutory plan itself. This Court has repeatedly stated that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4; *United States* v. *Testan*, *supra*, 424 U.S. at 399; *United States* v. *Sherwood*, 312 U.S. 584, 586; *Soriano* v. *United States*, 352 U.S. 270, 276. In light of this general principle, Section 1631(b) should not be construed to authorize retroactive payments to persons to whom the statute explicitly denies benefits.

Our position is supported by the very cases that the district court cited (J.S. App. 28A-30A) in support of its contrary holding: *Tatum* v. *Mathews*, *supra*, and *Johnson* v. *Mathews*, *supra*. These cases held that Social Security claimants had been denied procedural due process in connection with the termination of their SSI benefits, but that only claimants found *statutorily* eligible for benefits could obtain retroactive relief under Section 1631(b). Congress simply has not provided for retroactive payments under Section 1631(b) where claimants cannot establish statutory eligibility for such payments. Cf. *Edelman* v.

Jordan, 415 U.S. 651 (distinguishing between the award of an accrued monetary liability for past wrongs and prospective relief with monetary consequences); *Milliken* v. *Bradley*, 433 U.S. 267, 288-290 (same).

To be sure, this Court, without mentioning the sovereign immunity problem, has occasionally approved the payment of benefits as an accrued liability in the course of affirming decisions that had invalidated Social Security provisions on constitutional grounds. See, *e.g.*, *Califano* v. *Goldfarb*, 430 U.S. 199, affirming 396 F. Supp. 308 (E.D. N.Y.); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, affirming 367 F. Supp. 981 (D. N.J.). Because these cases do not discuss the problem, however, they do not preclude the Court from disapproving retroactive relief now. In recognizing the states' Eleventh Amendment immunity from retroactive monetary relief in *Edelman* v. *Jordan*, *supra*, the Court explicitly departed from four previous cases (including one decided after plenary consideration) that had approved such relief without explicitly considering the Eleventh Amendment problem (415 U.S. at 670-671).[18]

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[18] See also *Stone* v. *Powell*, 428 U.S. 465, 480-481 and nn. 14, 15; *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38; *Webster* v. *Fall*, 266 U.S. 507, 511 ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents").

III

THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN LIMITING MONETARY RELIEF TO CLASS MEMBERS WHO ARE CURRENTLY NEEDY

Should this Court hold the 30-day rule unconstitutional and decide that retroactive class relief may be awarded, it will need to consider the question raised in Aznavorian's appeal, *i.e.*, whether the district court properly limited monetary relief to "currently needy" class members. The district court, invoking its equitable discretion, awarded retroactive relief to only those class members who were receiving SSI benefits on the date of the court's order or who would have been receiving such benefits on that date had it not been for Section 1611(f). The court ruled that only these persons were entitled to receive SSI benefits that had been withheld under the invalidated 30-day rule (J.S. App. 31A, 36A-37A). The district court explained that "[t]he purpose of the SSI program is to help those who are *currently* needy," and that therefore the payment of retroactive benefits to persons not currently needy would not advance the goal of the statutory program (J.S. App. 31A). This was a reasonable exercise of the court's discretion and should not be disturbed.

Aznavorian maintains (No. 77-5999 J.S. 12) that the district court lacked discretion to deny retroactive relief to certain class members, because Section 1631(b) of the Act, 42 U.S.C. (Supp. V) 1383(b), requires the payment of SSI benefits withheld under an unconstitutional statutory provision. We have argued

(see pages 28-30, *supra*) that Section 1631(b) does not even *authorize* the payment of benefits; whether or not we are right in this, the statute certainly does not *require* the payment of benefits to claimants not statutorily eligible to receive them.

Because no statute requires the payment of retroactive benefits, the district court properly could exercise the broad discretion that normally governs the award of equitable remedies. See, *e.g.*, *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-331. The district court did not abuse its discretion in limiting its remedy to those who are currently needy, and in refusing to burden the Social Security Administration and the taxpayers with the expense of paying SSI benefits to persons who no longer need them and who are not entitled to them under the statute. Cf. *Rothstein* v. *Wyman*, 467 F.2d 226, 235 (C.A. 2), certiorari denied, 411 U.S. 921 (retroactive payments not required to class members improperly denied benefits under the Aid to Families with Dependent Children program).

CONCLUSION

The district court's judgment should be reversed. Should this Court decide that the district court correctly ordered retroactive class relief, the district court's limitation of that remedy to "currently needy" class members should be affirmed.

Respectfully submitted.

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